84-1437

No. ——

Office - Supreme Court, U.S.
FILED
MAR 11 1985
ALEXANDER L. STEVAS
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

PETER V. ALEXANDER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRENDAN V. SULLIVAN, JR.
HAROLD UNGAR
JUDITH A. MILLER
(Counsel of Record)
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

92 pp

QUESTIONS PRESENTED

1. Whether this Court's opinion in *Russell* v. *United States* may now properly be limited to sustain an indictment so vague as to allow a petit jury to return a conviction on a ground that the grand jury did not consider.

2. Whether the Confrontation Clause of the Sixth Amendment prohibits a non-expert witness in a criminal case from rendering an opinion based upon survey evidence.

3. Where the government is shown on the record to have applied an improper interpretation of *Brady* v. *Maryland* in deciding what evidence it is obliged to disclose to the defense, is the government then required to re-evaluate under the correct *Brady* standard all the evidence which it had withheld.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	9
I. The Indictment's Failure to Provide Notice and to Limit the Petit Jury to Charges Returned by the Grand Jury Conflicts with Prior Decisions of This Court and Creates a Conflict within the Circuits	9
II. Admission of Non-Expert Hearsay Testimony in Violation of the Confrontation Clause Conflicts with Prior Decisions of this Court	16
III. The Government's Demonstrated Incorrect Interpretation of *Brady* v. *Maryland* Requires Reevaluation of its Evidence Under a Correct Standard	20
CONCLUSION	24
APPENDIX	
A. Opinion of the United States Court of Appeals for the Fourth Circuit	1a
B. Judgment of the United States Court of Appeals for the Fourth Circuit	17a

TABLE OF CONTENTS—Continued

Page

C. Order denying Rehearing of the United States Court of Appeals for the Fourth Circuit 19a

D. Judgment of the United States District Court for the Eastern District of Virginia.... 21a

E. Order Extending Time to File a Petition for Writ of Certiorari 24a

F. Statutes Involved 25a

G. Indictment 28a

H. Excerpt of Testimony (Cross Examination of Mr. Halloran re Peer Group Study)..... 58a

TABLE OF AUTHORITIES

Cases: Page

Alford v. *United States*, 282 U.S. 687 (1931) 22
Brady v. *Maryland*, 373 U.S. 83 (1963) ..... *passim*
Brookhart v. *Janis*, 384 U.S. 1 (1966) 22
Cochran and Sayre v. *United States*, 157 U.S. 286 (1895) 9
Davis v. *Alaska*, 415 U.S. 308 (1974) 20, 22
Gordon v. *United States*, 438 F.2d 858 (5th Cir.), *cert. denied*, 404 U.S. 828 (1971) 18
Hagner v. *United States*, 285 U.S. 427 (1932) 9
Haupt v. *United States*, 330 U.S. 631 (1947) 15
The Hoppet v. *United States*, 11 U.S. (7 Cranch) 389 (1813) 9
Ohio v. *Roberts*, 448 U.S. 56 (1980) 16
Rosen v. *United States*, 161 U.S. 29 (1896) 9
Russell v. *United States*, 369 U.S. 749 (1962) ..... *passim*
Smith v. *Illinois*, 390 U.S. 129 (1968) 22
Stirone v. *United States*, 361 U.S. 212 (1960) 10, 11, 13
United States v. *Abel*, 105 S.Ct. 465 (1984) 21
United States v. *Agurs*, 427 U.S. 97 (1976) 21
United States v. *Alexander*, 748 F.2d 185 (1984) 1
United States v. *Cronic*, 104 S.Ct. 2039 (1984) 20
United States v. *Cruikshank*, 92 U.S. 542 (1875) 9, 12
United States v. *Lawson*, 653 F.2d 299 (7th Cir. 1981), *cert. denied*, 454 U.S. 1150 (1982) 19
United States v. *Miller*, 715 F.2d 1360 (9th Cir. 1983), *modified*, 728 F.2d 1269, *cert. granted*, 105 S.Ct. 78 (1984) (Argued 1/16/85) (No. 83-1750) 10, 11, 15
United States v. *Pruitt*, 702 F.2d 152 (8th Cir. 1983) 7
United States v. *Radetsky*, 535 F.2d 556 (10th Cir.), *cert. denied*, 429 U.S. 820 (1976) 12, 13

Constitutional Provisions, Statutes and Rules:

Fifth Amendment ..... *passim*
Sixth Amendment ..... *passim*
18 U.S.C. § 2 2
18 U.S.C. § 287 2

TABLE OF AUTHORITIES—Continued

	Page
18 U.S.C. § 1341	2
18 U.S.C. § 3500	*passim*
28 U.S.C. § 1254(1)	2
42 U.S.C. § 1396(h)	2
Fed. R. Crim. Pro.:	
Rule 26.2	21
Fed. R. Evid.:	
Rule 608	22
Rule 702	19
Rule 703	19
Rule 705	19
Other Authorities:	
Advisory Committee Note to Rule 705, Fed. R. Evid.	19
Physicians' *Current Procedural Terminology* (4th ed. 1977)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. ———

PETER V. ALEXANDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the judgment of conviction entered in the United States District Court for the Eastern District of Virginia, Norfolk Division.

OPINION BELOW

The opinion of the court of appeals is reported at 748 F.2d 185 and is printed in Appendix A, pp. 1a-16a.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1984 (Appendix B). A timely petition for rehearing was denied December 11, 1984 (Appendix C).

On January 23, 1985, Chief Justice Burger extended the time for filing this Petition for Writ of Certiorari to and including March 11, 1985 (Appendix E).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254( ).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a grand jury . . . nor shall any person for the same offense to be twice put in jeopardy of life or limb . . . or be deprived of life, liberty or property, without due process of law . . .

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and the cause of the accusation; to be confronted with witnesses against him . . .

STATUTES INVOLVED

The relevant portions of 18 U.S.C. §§ 2, 287 and 1341, and 42 U.S.C. § 1396 (h) are reprinted in Appendix F.

STATEMENT OF THE CASE

On May 10, 1983 a forty count indictment was returned against petitioner Dr. Peter Alexander. App. G.[1] It was based on charges of fraudulent billings to three insurance companies that allegedly occurred in Alexander's gynecology practice in Virginia Beach.

---

[1] References herein to "App." are to the Appendix to the Petition; references to "C.A." are to the Appendix filed in the Court of Appeals; references to "C.A. Exh. Vol." are to the Exhibit Volumes filed in the Court of Appeals.

The indictment alleged, with respect to its thirty-one mail fraud counts, that Alexander had engaged in an eight part scheme[2] to defraud the Civilian Health and Medical Program of the Uniformed Services ("CHAMPUS"), Blue Cross/Blue Shield and Medicaid. The mail fraud counts did not, however, identify by name even one patient whose claim form was allegedly fraudulent. Instead, each count—with one exception—[3] simply identified a check; its amount; and the fact that it was mailed on a certain date by one of the three insurance providers.

At trial, the government's case was not that all the patient claims and services covered by a mailed check were fraudulent, or that Alexander's entire practice was a sham. Instead the government's case typically rested on the identification of one of many patient claim forms covered by the mailed check, and an explanation of why that particular form was alleged to be fraudulent.

Because the indictment itself contained no information concerning the identity of the patient or the nature of the claimed fraud(s) actually at issue in each mail fraud count, it was impossible for the petitioner to prepare his defense prior to trial. The enormity of the problem is illustrated by the following graphic analysis of the evidence presented by the prosecution on Counts 1 through 5:

---

[2] The fraudulent practices charged included duplicating claims for the same services to more than one of the organizations; using procedure codes to submit false claims; falsely claiming to have performed certain medical tests; claiming to have performed pregnancy tests on sterilized women; claiming to have diagnosed illnesses to obtain compensation for routine office visits; claiming higher fees than those charged cash-paying patients; claiming to have provided "comprehensive" service instead of "brief" or "intermediate" service; claiming payment for post-operative visits covered in the surgery allowances. App. 32a-34a.

[3] The exception was Count One, where the indictment simply charged that an envelope was mailed on a certain date. App. 34a.

Count	Amount of Check	No. of Claims Covered	No. of Allegedly Fraudulent Claims
Count 1	$5752	78	1
Count 2	$1451	28	1
Count 3	$ 818	16	1
Count 4	$1255	14	1
Count 5	$2816	46	1

With respect to each patient claim actually at issue, the only way to prepare a defense was to look at the claim, hear the fraud actually charged concerning that claim, compare the claim to the patient's history and chart, compare the claim and the history to the applicable billing guidelines,[4] and interview the patient involved if the records were not clear. None of this could be done while the trial itself was in progress. The result was that the government's case came in virtually unchallenged—even though information on the government's own exhibits often conflicted with the theory of fraud its witnesses expounded.[5]

---

[4] Checking the billing guidelines and rules for CHAMPUS alone, a task that requires consulting six loose-leaf notebooks as well as the Code of Federal Regulations, is time consuming, but essential. For example, one of the government's theories was that charging for post-operative visits was improper. The billing guidelines, however, permit such charges if the operative procedure itself was "diagnostic" (which requires checking the guidelines' characterization of the procedure in question, and the patient's history to see why the procedure was done), or if the post-operative visit was to treat a "complication" of the surgery, or to treat a new element (again requiring evaluation of the patient's history). *See* Physicians' *Current Procedural Terminology* (4th ed., 1977) at 51.

[5] For example, the CHAMPUS auditor testified that petitioner had improperly billed two insurance companies for the same services when the claim forms alleged to be fraudulent showed the contrary; she accused petitioner of never collecting deductibles, and thus overcharging CHAMPUS, when vouchers used as government exhibits again demonstrated the contrary; she stated that petitioner never billed for less than a "comprehensive" visit when again the exhibit vouchers contradicted her; she stated that petitioner never reported other insurance, and again the exhibit

At trial, the government's evidence on the mail fraud counts was entirely circumstantial, and rested in large part on the testimony of three auditors (from CHAMPUS, Blue Cross and Medicaid). Each auditor testified that he or she disallowed Alexander's claims for laboratory tests, and concluded that such tests were not performed in specific instances because Alexander had recorded the test results in the notes of his examination, and not on a separate lab sheet. C.A. 149, 250, 286. This novel "requirement" of a separate lab sheet—which the auditors themselves were unable to explain (and which had not been required by previous Medicaid and Blue Cross audits accepting Dr. Alexander's method of recording tests)—was imposed, not by insurance regulations or guidelines, but by the "protocol" for Dr. Alexander's audits adopted for this case by the auditors' respective supervisors. C.A. 187-88, 289.

Significantly, the Medicaid and Blue Cross auditors then testified about "peer group" statistical evidence, purporting to compare the petitioner's billing practices with his "peer group", and concluding that Dr. Alexander billed for more of these tests per patient visit than comparable doctors. C.A. 254-55. This evidence was undoubtedly highly persuasive to the jury on the hotly-contested issue of test performance, and the Assistant U.S. Attorney emphasized his reliance on this testimony at the outset of his closing argument.[6] C.A. 977-78. This evidence could not, however, be tested by cross examination. The Medicaid auditor had not done the peer group

---

vouchers and claim forms contradicted her. *Cf. e.g.*, C.A. 161-167 with C.A. Exh. Vol. 132, 1142, 1149, 1156; C.A. 155 with C.A. Exh. Vol. 1117-31, 1136-41, 1146-48; C.A. 147 with C.A. Exh. Vol. 1119, 1128, 1147, 1490; C.A. 145 with C.A. Exh. Vol. 1139, 1469a-d.

[6] The only other evidence offered on the mail fraud counts was also circumstantial, and consisted of testimony from some of Alexander's former secretaries concerning their failure to observe him performing tests; testimony concerning supplies; and expert testimony criticizing Alexander's microscope but conceding that it was possible to use the microscope to perform the tests billed.

analysis himself; was not an expert in such analysis or in statistics; could not explain why surgeons and obstetricians were included as "peers" of a gynecologist; had not made available the records reviewed; could not explain how the records were chosen—and yet was permitted to give hearsay testimony as to the results of this "analysis". App. H. The Blue Cross auditor's testimony suffered from similar flaws. C.A. 279-81.

Although petitioner testified at trial and denied the charges, on July 29, 1983 he was found guilty on the thirty mail fraud counts submitted to the jury. A verdict of guilty was also returned on five false claim counts, and the single false statement count. C.A. 1055-57. On November 10, 1983, petitioner's motions for a new trial and additional discovery were denied, and the trial court sentenced him to concurrent thirty-month prison terms and cumulative $500.00 fines on counts 1 and 40, suspended imposition of sentence on the remaining counts and ordered that petitioner be placed on probation for five years at the expiration of his period of incarceration. App. D.

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the convictions, "except as remanded for the limited purpose of reconsidering defendant's new trial motion." App. 16a. The Court rejected the argument that the indictment did not give adequate notice of the charges against Dr. Alexander, holding that "any need for further detail could have been supplied by a timely requested bill of particulars." App. 9a. The Court ignored petitioner's argument that admission of testimony concerning the "peer group" studies was error under the Confrontation Clause of the Sixth Amendment, and instead, viewing the issue as one of the trial court's discretion, conclusorily found "no abuse." App. 9a. The Court was troubled by the argument that convictions on some counts had been obtained where there was insufficient evidence as a matter of law to sustain a conviction on one of the theories submitted to the jury,

but based on a "scrutiny" of the record concluded that "the jury here relied upon the supported rather than the arguably unsupported factual theory." App. 9a.[7]

The Court of Appeals ordered a remand under *Brady* v. *Maryland*, 373 U.S. 83 (1963), on the limited issue of whether the government had suppressed results of a Blue Cross patient survey in which patients had voluntarily confirmed that Alexander in fact performed the tests that he had billed to Blue Cross. The Court rejected the government's argument that such information could be exculpatory only if it directly rebutted one of the specific patient claim forms identified at trial as being fraudulent, holding that such evidence "could tend to rebut the Government's proof of a pervasive practice of not performing tests as a circumstantial means of proving guilt of the specific offenses charged," and "could provide credible evidence that Alexander's failure to indicate test results on his office records was not probative that he had not in fact performed them . . ." App. 15a. The Court thus expressly rejected the basis on which the government had evaluated whether the information in its possession was exculpatory. It also found that the government's constantly changing story of what had been produced during discovery had "fatally compromised the integrity of the proceedings on the new trial

---

[7] The Court also dismissed the claim that petitioner's conviction on three of the false claim counts was not supported by the evidence, concluding on rehearing that the claims had had a " 'tendency to induce the government to act' " (citing *United States* v. *Pruitt*, 702 F.2d 152, 155 (8th Cir. 1983). 20a. The Court simply did not address the point that, *e.g.*, the claim form in Count 33, which reported that the charge for services had already been paid in full, was in fact not a false claim for payment, since no payment was demanded. Nor did the Court address the point that under *Pruitt*, *supra*, to support a false claim conviction, the government must show a tendency to place "the claimant in a position to receive government benefits." *Id.* The government, however, offered no testimony or evidence showing that improper benefits were considered or paid to Alexander or anyone else.

motion." App. 10a. The Court nevertheless, and inexplicably, refused to require inquiry by the District Court on remand as to what other exculpatory or Jencks Act material in the government's possession had been suppressed either because of the prosecution's misinterpretation of *Brady* or because of its "equivocation" in providing discovery. App. 9a-10a.

In sum, Dr. Alexander went to trial knowing none of the specific facts and circumstances on which the mail fraud counts of the indictment were based. No *Brady* material had been produced, although exculpatory material was in the government's possession. Not one page of grand jury testimony was produced under the Jencks Act (the government having remarkably claimed to the trial court that "there was none in this case because there was no time for it.") C.A. 1094. The Jencks production that did occur one day before trial was incomplete—*e.g.*, conclusory audit reports from the government's three crucial auditor witnesses did not identify the claims audited, although such information had to have been compiled and was essential to preparing a cross-examination of those witnesses. The "peer group" studies were not produced at all.

In a case resting so completely on circumstantial evidence, and consequently particularly vulnerable to an informed attack, the government's unconstitutional failure to specify its charges and to provide adequate discovery made it impossible for the defense to prepare its case before trial. Those errors were compounded at trial when the auditors were permitted to bolster their circumstantial testimony by describing "peer group" studies that the government itself conceded on appeal were hearsay. Br. for United States at 34. Despite those fundamental errors, the Court of Appeals declined to reverse, and on December 11, 1984, denied Alexander's petition for rehearing.

REASONS FOR GRANTING THE WRIT

I. The Indictment's Failure to Provide Notice and to Limit the Petit Jury to Charges Returned by the Grand Jury Conflicts With Prior Decisions of This Court and Creates a Conflict within the Circuits

Ever since *The Hoppet* v. *United States*, 11 U.S. (7 Cranch) 389 (1813), this Court has required that an indictment or information must contain the elements of the offense charged *and* must provide the accused with the details of the pattern of conduct prosecuted, so that a defense to the charge can be prepared. Those requirements are summarized in this Court's opinion in *Russell* v. *United States*, 369 U.S. 749, 763-64 and 768 (1962):

> These criteria are first, whether the indictment "contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet,'" and secondly, "'in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' *Cochran and Sayre* v. *United States*, 157 U.S. 286, 290; *Rosen* v. *United States*, 161 U.S. 29, 34." *Hagner* v. *United States*, 285 U.S. 427, 431 . . .
>
> [A]n important corollary purpose to be served by the requirement that the indictment set out the "specific offense" . . . is "to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had." [quoting *United States* v. *Cruikshank*, 92 U.S. 542, 558 (1875)].

The mail fraud counts in this case (with one exception) contain the bare elements of the offense charged, but they do not provide the notice required by the Fifth and Sixth Amendments. Their complete lack of specificity made it possible for the prosecution to seek petitioner's conviction on facts not found by, and perhaps not

even presented to, the grand jury that indicted him, in violation of *Russell* v. *United States*, 369 U.S. 749 and *Stirone* v. *United States*, 361 U.S. 212 (1960). Unconfined by any specifics in the indictment, the prosecution was free to shift its emphasis and factual presentation at will, creating a moving and unpredictable target for both the defense and the trial court.

Count One illustrates the problem. The indictment did not even allege the insurance provider or amount of the check at issue on that count, although the prosecution did provide to the defense a copy of the check it claimed the grand jury had had in mind. Depending on whether and what evidence was in fact presented to the grand jury concerning that check, the grand jury could have had in mind as fraudulent any one of forty-three patient claim forms or three hundred and fifty-four services billed on those forms. C.A. Exh. Vol. 117-31. At trial the government alleged that the claim for only one of those patients was fraudulent, because the four services billed to CHAMPUS on that claim were not performed, and because Alexander had billed and collected from Blue Cross for some of the same services.[8] None of these specific allegations appear in or can be implied from the language of the indictment, no matter how imaginatively it is read.

The defects of the indictment in this case are underlined by comparing it with the indictment presently before this Court in *United States* v. *Miller*, 715 F.2d 1360 (9th Cir. 1983), *modified* 728 F.2d 1269, *cert. granted*, 105 S.Ct. 78 (1984) (Argued 11/16/85) (No. 83-1750). In *Miller*, another mail fraud case, the defendant was charged with a simple two-part fraudulent scheme in support of the mail fraud alleged—but only one part

---

[8] In fact, the exhibits introduced by the government at trial showed that duplicate billing had not occurred. *See* Fourth Circuit opinion, App. 6a-7a.

of that scheme was ultimately submitted to the jury. The question before this Court in *Miller* is whether this explicit narrowing of the scheme at trial, thus departing from the grand jury's charge, required reversal.[9] In this case, by contrast, the defense's surprise at the actual basis for the government's case was so pervasive—and the uncertainty about what the grand jury had actually charged so great—that even when the government's exhibits directly contradicted portions of the fraudulent scheme that the government presented through testimony at trial, neither trial counsel nor the trial court even noticed the problem, much less considered whether an improper "narrowing" of the charges had occurred.[10]

The failure of the indictment in this case to specify the patient claims actually alleged to be fraudulent should not be dismissed simply as an omission of "evidentiary detail" that could have been cured by a bill of particulars. As this Court reasoned in *Russell*, in rejecting a similar argument: "To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." That is a particularly vivid possibility in

---

[9] Interestingly, even under the government's analysis in *Miller*, asking for reversal and suggesting a limiting construction, *inter alia*, of *Stirone* v. *United States*, 361 U.S. 212, the Fourth Circuit erred in this case. The government in its brief in *Miller* at least recognizes that notice and a defendant's ability to prepare his defense are important parts of an indictment, and states that when notice is at issue, the reviewing court should evaluate whether lack of notice substantially prejudiced the defendant's case. *See* Brief for the United States at 45-46. The Fourth Circuit undertook no such analysis of prejudice in this case.

[10] *See e.g.*, discussion *infra* at 14-15.

this case, where the government has remarkably claimed that *no* testimony was presented to the grand jury.[11]

Even with respect to a simple stolen-property case this Court has recognized: "an indictment would be bad that did not specify with some degree of certainty the articles stolen. This because the accused must be advised of the essential particulars of the charge against him and the court must be able to decide whether the property taken was such as was the subject of larceny." *United States* v. *Cruikshank*, 92 U.S. 542, 558 (1875). The charges in this case were far from the simplicity of a stolen property case, yet any information concerning the charges actually proved by the government at trial was wholly absent from the indictment.

In *United States* v. *Radetsky*, 535 F.2d 556 (10th Cir.), *cert. denied*, 429 U.S. 820 (1976), the Tenth Circuit considered the question of indictment sufficiency in a factual setting very similar to the one in this case. In *Radetsky*, the defendant doctor was charged in somewhat general terms with the falsification of services and charges relating to Medicare claims. He argued that the indictment's failure to allege the exact "services" and "charges" claimed to have been fraudulent permitted the government to choose to introduce proof on any of numerous items, whether or not they had been presented to the grand jury.[12] The Court characterized this question

---

[11] C.A. 1094. Since that representation was made by government counsel at the argument on defendant's new trial motion in the District Court, the government has claimed in its appellate brief (without record support) that an unidentified summary witness testified before the grand jury. Br. for United States at 37. But two of the audit reports, for Blue Cross and Medicaid, had not even been written at the time the indictment was returned, making it unlikely that the specific claim forms urged by the government at trial to have been fraudulent had even been identified at the time this case was presented to the grand jury.

[12] In contrast to this case, the defendant in *Radetsky* was supplied with a Bill of Particulars before trial, curing the lack of notice that

as "difficult and close, in view of the requirements of the Fifth Amendment guaranty, as applied in *Stirone*, in *Russell* and in similar cases." 535 F.2d at 564. The court ultimately rejected the defendant's argument, even while characterizing the question as "serious and not free from doubt," *id.* at 565, because the indictment did contain important specifics:

> [I]t identifies each of the basic documents—the requests for payment that are relied on as containing the false statements. Their dates and the single individual patients involved are set out together with the period of time covered by each request for payment. The four types of concealment and falsifications charged are specified (by count)—medical services not rendered, by date; medical procedures and services not fully, truly and accurately described ("services"); charges being at a higher rate and more than customary for the same service; and the amounts paid, allegedly inflated above amounts already paid by the patients.

535 F.2d at 564-65.

None of the information specifically relied upon by the Tenth Circuit as saving the *Radetsky* indictment from invalidity was provided to petitioner in this case. Going into trial, the government could thus have chosen from among any of six hundred forty-one patient claims and over three thousand patient services covered by the checks identified in the mail fraud counts in order to present its case,[13] and its choice was not trammeled in

---

plagued petitioner in this case. The opinion in *Radetsky* is thus concerned exclusively with the pure *"Russell"* question of whether there was a sufficient identification of the facts charged in the indictment to prevent the government from selecting and presenting proof at trial without regard to whether it had been presented to and considered by the grand jury.

[13] The charges actually put in issue as improper under the government's proof for the entire indictment amounted to well under

any way by what facts the grand jury actually considered in returning the indictment.

The types of prejudice suffered by petitioner as a result of leaving the government free to pick and choose its case without concern for what the grand jury found can be illustrated by counts one through four. With respect to the four patient claim forms identified at trial as at issue in those counts two main theories of fraud were alleged: 1) that Dr. Alexander had improperly sought to receive duplicate payments from both CHAMPUS and Blue Cross for the same services; and 2) that Dr. Alexander had not provided the services claimed. With respect to the first theory, the claim forms themselves demonstrated that duplicate payments had not been made. *See* Court of Appeals' Opinion, App. 6a-7a. Not knowing beforehand what fraud was alleged or even what patient's care was at issue, neither petitioner's trial counsel nor the court noticed that the claim forms themselves were inconsistent with the government's theory. As a result, the government's witnesses were not cross-examined on this issue, and the trial court did not even have an opportunity to consider withdrawing this theory of fraud from the jury's consideration.[14] Thus neither *Russell's* primary nor corollary purposes for specificity of an indictment were met: the defendant did not have notice of what he had to be prepared to meet, and could not be sure that the charges at trial had even been considered by the grand jury; and the trial court itself lacked adequate information to supervise the trial "intelligently," and to recognize whether the facts alleged

---

$3000. Put another way, only five percent of the total dollar amount of the checks alleged in the mail fraud counts was actually challenged as unlawful by the government's proof at trial.

[14] And of course—assuming that the grand jury heard any evidence on these counts—the inadequate duplicative billing theory may have been the theory on which the grand jury indicted.

sufficed to support a conviction. *Russell* v. *United States*, 369 U.S. at 768-769 and n.15.[15]

Although rules about the sufficiency of indictments are well established in theory, their applicability should be addressed and affirmed by this Court in the context of a case reflecting the complexity of modern prosecutions under such widely used charging statutes as 18 U.S.C. § 1341. In this case, despite the general verbiage of a forty-count indictment, the petitioner in fact went to trial under a "cryptic form of indictment" that left "the chief issue" for each mail fraud count "undefined." *Russell* v. *United States*, 369 U.S. at 766. The prosecution was as a result free to shift its theory of criminality with "each passing vicissitude of the trial and appeal," with no assurance that the facts on which petitioner was convicted were "even presented to the grand jury." *Id.* at 768, 770. By granting *certiorari* in *United States* v. *Miller*, 105 S.Ct. 78, this Court has already recognized the importance of clarifying the relationship between indictment and proof at trial. This case will permit the

---

[15] With respect to Counts 1-4, the Court of Appeals assumed without deciding that conviction on the "duplicate billing" theory would have been error, but conducted a retrospective scrutiny of the record to conclude, by looking to the jury's decisions on other counts, that the jury convicted on the "nonperformance of tests" theory. This effort to appraise what the jury would have done is always risky. *See, e.g., Haupt* v. *United States*, 330 U.S. 631, 641 and n.1 (1947). Here the effort was doomed from the outset because, just as with the trial court, the Court of Appeals' review was undermined by *its* confusion as to what the indictment charged. The Court looked first to other CHAMPUS mail fraud counts where a conviction had been obtained, saying that those counts rested only on a "nonperformed test" theory, when in fact the evidence in support of most of those counts also rested on a "duplicate billing" theory. And in seeking to tease out which of the "two" fraudulent theories the jury relied on, the Court completely lost track of the fact that the indictment alleged eight separate theories of fraud, any one of which—depending on the government's theory at trial and not on what the grand jury decided—could have been seized upon by the petit jury with respect to a specific count.

Court to complete that clarification process, but in a context where the costs to the fact-finding process of failing to enforce the applicable Fifth and Sixth Amendment guarantees of indictment specificity are unmistakable.

II. Admission of Non-Expert Hearsay Testimony in Violation of the Confrontation Clause Conflicts with Prior Decisions of this Court

The Confrontation Clause of the Sixth Amendment restricts the range of admissible hearsay in two ways:

> [T]he prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant . . . Once a witness is shown to be unavailable . . . the Clause countenances only hearsay . . . that bear[s] adequate . . . 'indicia of reliability' . . .
>
> Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."

Ohio v. *Roberts* 448 U.S. 56, 65-66 (1980).

These principles were simply ignored by the trial court and by the Fourth Circuit. Mr. Halloran, the Medicaid auditor who testified at trial,[16] was permitted

---

[16] Mr. Halloran was simply identified at trial as an Investigation Supervisor with Virginia Medicaid who had examined one hundred and seventy-four of petitioner's Medicaid records. C.A. 247-48. He was not proffered as an expert witness and had had no formal medical training. C.A. 268. He nevertheless was permitted to testify, not only about the peer group study described above, but also to give in effect a medical opinion in support of his testimony on all the Medicaid mail fraud counts that pregnancy tests on "sterilized" patients were improper and unnecessary—even though such tests, *e.g.*, on patients with tubal ligations are in fact required by the applicable standard of medical care, which recognizes that ligations do not always accomplish the intended results of preventing pregnancy. Cf. C.A. 249, 257 with C.A. 724-26.

to testify about the results of a "peer group" study he did not perform and could not explain. Nor could he identify who it was who had prepared the study. App. 58a. There was certainly no showing by the government either that the author(s) of the study were unavailable or that their study bore "indicia of reliability" that would bring it within a recognized hearsay exception. Neither the study nor the records on which it was based were proffered as exhibits or even offered for inspection to petitioner's trial counsel. C.A. 196. The result was that petitioner's counsel had no information to use in his effort to cross examine Mr. Halloran, and the blindfolded efforts he could make were ineffectual, because Mr. Halloran responded to challenges by taking refuge alternately in the fact that he had not performed the study, or by volunteering "explanations" that he was unqualified to give. App. H.

The petitioner's inability to effectively challenge the "peer group" study unquestionably and profoundly damaged his case. The jury could not have helped but weigh heavily the "fact" it purportedly established—that Alexander billed for many more tests of a certain kind than his "peers." The problem was that the selection of these peers, and the judgment of comparability implied by that selection, was highly suspect. There is no reason to expect, for example, that general surgeons—who treat men, women and children for a variety of surgical problems—would use the same battery of tests as a practicing gynecologist such as Dr. Alexander. Indeed, Mr. Halloran testified, when asked about the surprising inclusion of surgeons in the "peer group", "I can't explain why surgeons are in it any more than you can, sir." App. 58a. Many doctors use outside laboratories for testing and do not themselves bill patients for the tests ordered—thus seriously distorting the comparison with Dr. Alexander, who performed and billed his own tests. When confronted with that issue, with respect to surgeons (whose

tests are often conducted in a hospital, and billed separately), Mr. Halloran stated that Alexander's hospital patients "would offset" the surgeons' patients "from a statistical standpoint"—even though Mr. Halloran clearly had not made such a statistical comparison and was not in fact qualified to make such comparisons. App. 58a-59a.

There are many other questions casting doubt on the validity of the "peer group" study that could have been asked if Halloran had known anything about the study, and if petitioner's counsel had had the study and underlying documents in hand. Why were obstetricians included when Alexander's practice was almost entirely gynecology? Didn't the laboratory tests differ for the two types of practices? Did other gynecologists substitute and bill for comparable but more sophisticated laboratory tests than the ones performed in petitioner's office? Was there any effort to compare the type of gynecological practices at issues? (In a predominantly young patient practice as was Alexander's, for example pregnancy tests are necessary more frequently than in an older patient practice.) Were the surgeon's male and child patients excluded from the statistical base? Was there *any* effort to make this "peer group study" in fact comparable to Dr. Alexander's practice?

The questions that could have been posed with respect to Mr. Halloran's "study" apply equally to the Blue Cross auditor's "peer group" study. Mrs. Crumpler at least testified that she looked at the records herself, but again the records were not admitted into evidence or offered for inspection by defense counsel. C.A. 280. Thus her testimony about the contents of the records was hearsay, absent an exception permitting its admission. Contents of numerous documents are often testified to by a summary witness—but such testimony can be admitted only when the underlying documents are themselves admitted into evidence. *See, e.g., Gordon* v. *United States*, 438 F.2d 858, 876 (5th Cir.), *cert. denied*, 404 U.S. 828

(1971). The only other possible justification was that Mrs. Crumpler was testifying as an expert witness, concerning evidence "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Rule 703, Fed. R. Evid. But Mrs. Crumpler was not qualified as an expert in this area;[17] nor was there any basis in her testimony for finding that the data she used was of a type "reasonably relied upon" by experts to form opinions concerning comparability. *See also United States* v. *Lawson*, 653 F.2d 299, 302 (7th Cir. 1981), *cert. denied*, 454 U.S. 1150 (1982), emphasizing that in addition to the showing of "reasonable reliance" required by Rule 703, the defendant must also have access to the hearsay information relied upon by the expert witness so that effective cross examination is possible.[18]

In its brief below, the government conceded that at least Mr. Halloran's testimony was hearsay (Br. for United States at 34), but urged that its admission was not plain error. The Court of Appeals brushed the problem aside with no analysis by finding the trial court had not abused its discretion in admitting this testimony. App. at 5a, n.6. The trial court does not, however, have "discretion" to ignore the requirements of the Confrontation Clause. To the contrary, under this Court's decisions, once "petitioner has been denied the right of effective cross-examination," no specific showing of prejudice is required, because this is "constitutional error of the first

---

[17] Mrs. Crumpler testified simply that she was a health care analyst for Blue Cross/Blue Shield of Virginia. She was not proffered or qualified as an expert witness under Rule 702, Fed. R. Evid. C.A. 277.

[18] The *Lawson* court also relied on the Advisory Committee note to Rule 705, that it "assumes that the cross-examiner has the advance knowledge which is essential for effective cross-examination." Here neither the "peer group study" nor the underlying records were turned over to the defense at any point during the trial.

magnitude and no amount of showing of want of prejudice would cure it." *Davis* v. *Alaska*, 415 U.S. 308, 318 (1974), quoted in *United States* v. *Cronic*, 104 S.Ct. 2039, 2047 (1984).

There is simply no question on this record that petitioner's right to confront witnesses was ignored and improper testimony was permitted on a point that was central to the government's circumstantial case against him. This Court should intervene to correct this error, not only because petitioner's case was irretrievably prejudiced, but to establish that Confrontation Clause errors of this magnitude require more from trial and appellate courts than casual dismissal. This Court, which originally promulgated the Federal Rules of Evidence, should ensure that the Rules' studied liberalization of provisions allowing expert witnesses to utilize hearsay is not carried over into allowing use of hearsay by lay witnesses at criminal trials, in violation of defendants' rights under the Confrontation Clause.

III. The Government's Demonstrated Incorrect Interpretation of Brady v. Maryland Requires Re-evaluation of Its Evidence Under a Correct Standard

The majority of the Fourth Circuit's opinion in this case deals with its displeasure with the government's representations concerning potentially exculpatory material under *Brady* v. *Maryland*, 373 U.S. 83 (1963). As described in the foregoing statement of the case, the Court remanded to the District Court for further inquiry on the government's apparent failure to turn over approximately 50 patient surveys sent out by Blue Cross prior to the investigation leading to the indictment in this case, in which many of the patients queried confirmed Dr. Alexander's performance of tests.

In so doing, the Court rejected the narrow standard purportedly used by the government to evaluate exculpatory evidence, and explicitly held instead that reports

from patients that confirmed Alexander's performance of tests were potentially exculpatory under *Brady*, given the government's theory of the case, even if those patients' claim forms were not specifically challenged by the government at trial. App. 14a-15a. And the Court remanded for further investigation of whether that Blue Cross patient survey (whose existence and positive results defendant discovered because of a brief allusion to it in a government report) was in fact turned over to the defense before trial. Further investigation on that point was necessary because the government had changed its story at least five times in responding to inquiries concerning defense access to the Blue Cross survey—including flatly assuring the trial court at argument on the new trial motion that the materials had been available for inspection, and then flatly telling the Court of Appeals at oral argument that they had not been in the government's possession at all. App. at 12a-14a.

The record briefly described above demonstrates two things: 1) that the government erred by using the wrong standard to evaluate whether evidence in its possession was exculpatory; [19] and 2) that in originally refusing further inquiry at the new trial motion argument on *Brady* and Jencks Act issues,[20] the District Court's reliance on the Assistant U.S. Attorney's representations concerning what discovery had occurred had been misplaced. In-

---

[19] These Blue Cross materials had been specifically requested. C.A. 58C-E. In violation of the rule established in *United States* v. *Agurs*, 427 U.S. 97, 106 (1976), however, the prosecution failed to respond "either by furnishing the information or by submitting the problem to the trial judge. When the prosecution receives a specific and relevant request, the failure to make any response is seldom, if ever, inexcusable."

[20] The Jencks Act, 18 U.S.C. § 3500, and Rule 26.2, Fed. R. Crim. Pro., govern the production of witness statements at trial.

The Fourth Circuit expressly recognized that the trial court cut short its inquiry on the *Brady* claim because of its reliance on "the statement of the United States attorney." App. 12a, n.9.

stead, however, of remanding to the District Court with directions to evaluate all of the discovery issues raised by petitioner's new trial motion, the Fourth Circuit limited the remand to the Blue Cross patient surveys, where the defendant could *prove* that the government had exculpatory evidence in its possession that had apparently not been disclosed.

This limitation simply does not make sense. There is no doubt that the government has investigatory material in its hands (such as interview notes and memoranda) that were never disclosed to the petitioner, and as to which the government clearly applied the wrong standard in evaluating *Brady* issues. It is also clear from the Court of Appeals opinion that the government's own representations concerning what was available for discovery in the first place cannot be trusted.[21]

It is further clear that the government's performance under the Jencks Act demands further scrutiny. Not one page of grand jury testimony was produced pursuant to

---

[21] The suppression of the Blue Cross patient survey was not the only *Brady* error identified by the petitioner below. Although he had specifically requested before trial the criminal records, pending criminal charges and reasons for cooperation with the government of prospective government witnesses, the extensive criminal record (and pending charges) of one of the government's principal witnesses, Ms. Rogowski—a former secretary whose testimony had special weight because, unlike other former employees, she had spent months, instead of a few days or weeks, in Dr. Alexander's employ—was suppressed. C.A. App. 1097 and C.A. Exh. Vol. 1632-46. The petitioner was therefore denied the ability to impeach this witness by evidence of conviction of crime (Rule 608, Fed. R. Evid.) or to inquire into bias (*United States* v. *Abel*, 105 S.Ct. 465 (1984).) Without this information, petitioner was denied the right to effective cross-examination that prior decisions of this Court in similar circumstances guarantee. *See Davis v. Alaska*, 415 U.S. 308, 318 (1974), relying on *Smith* v. *Illinois*, 390 U.S. 129 (1968); *Brookhart* v. *Janis*, 384 U.S. 1 (1966); *Alford* v. *United States*, 282 U.S. 687 (1931). Despite this clear precedent, the Court of Appeals found no error. App. 10a.

the Jencks Act—a state of the record that would make sense only if the grand jury had in fact improperly returned an indictment without hearing any testimony, as the government has claimed. C.A. 1094. Recently the government has informally suggested that Agent Powell (who was a government trial witness) may have testified as a summary witness before the grand jury [22]—but none of his grand jury testimony was produced. Although very brief audit reports of the three auditors were produced as Jencks material, the claims actually audited were not identified, and none of the work papers or other written evaluations of the auditors was produced, although it would have been impossible to audit hundreds of patient claims without recording the results somewhere. Nor was Mrs. Crumpler's "peer group study" produced. All of this putative Jencks material could have served to undermine the credibility of the government's witnesses and to provide exculpatory information for use upon their cross-examination.

The Court of Appeals' refusal to require inquiry by the District Court into these failures is on these facts irrational. It found that the government erred in its appraisal of exculpatory evidence and that it could not trust the government's description of the discovery process. There is simply no basis on this record for confidence that these kinds of errors did not result in the suppression of additional exulpatory evidence to which the defendant was entitled. This Court should grant review in order to consider whether once the government is shown on the record to have applied an improper interpretation of *Brady* v. *Maryland*, the government is then required to re-evaluate all of its evidence under the correct standard.

---

[22] Conversation with Assistant U.S. Attorney Bradenham (2/21/85, with Judith Miller).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

BRENDAN V. SULLIVAN, JR.
HAROLD UNGAR
JUDITH A. MILLER
(Counsel of Record)
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000
Attorneys for Petitioner

March 11, 1985

APPENDICES

TABLE OF CONTENTS

Page

APPENDIX A

Opinion of the United States Court of Appeals for the Fourth Circuit 1a

APPENDIX B

Judgment of the United States Court of Appeals for the Fourth Circuit 17a

APPENDIX C

Order denying Rehearing of the United States Court of Appeals for the Fourth Circuit 19a

APPENDIX D

Judgment of the United States District Court for the Eastern District of Virginia 21a

APPENDIX E

Order Extending Time to File a petition for writ of certiorari 24a

APPENDIX F

Statutes involved 25a

APPENDIX G

Indictment 28a

APPENDIX H

Excerpt of Testimony (Cross Examination of Mr. Halloran Re Peer Group Study) 58a

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 83-5283

UNITED STATES OF AMERICA,
Appellee,

versus

PETER V. ALEXANDER,
Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. MacKenzie, District Judge. (CR 83-86-N)

Argued June 8, 1984. Decided October 22, 1984

Before WINTER, Chief Judge, PHILLIPS, Circuit Judge and BUTZNER, Senior Circuit Judge.

Judith A. Miller (Brendan V. Sullivan, Jr.; Harold Ungar; and Williams & Connolly on brief) for Appellant; Janis Kockritz, Attorney, Department of Justice (Elsie L. Munsell, United States Attorney, Tommy E. Miller, Assistant United States Attorney, on brief) for Appellee.

PHILLIPS, Circuit Judge:

Dr. Peter V. Alexander appeals from multiple convictions for mail fraud, 18 U.S.C. § 1341, submission of a false claim, 18 U.S.C. § 287, and making a materially false statement, 42 U.S.C. § 1396k in connection with the submission of medical insurance claims. We remand the case for reconsideration of the defendant's motion for new trial on the grounds of failure by the Government to produce *Brady* materials, and for such further proceedings as may then be warranted. Subject to that reconsideration, we affirm the convictions.

I

At relevant times, Dr. Alexander operated a medical practice in Virginia Beach, Virginia, specializing in gynecology and obstetrics. The charges against Dr. Alexander arose out of his dealings with three major health insurers: (1) the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS); (2) Medicaid; and (3) Blue Cross/Blue Shield. In essence, the indictment alleges that, between May 15, 1978, and December 7, 1982, Alexander perpetrated a fraudulent scheme on these insurers which involved the following eight different "parts": (a) submitting duplicate claims for the same services to more than one insurer; (b) using the Current Procedural Terminology (CPT) codes to submit false claims to all three; (c) falsely claiming that certain services had been performed when in fact they had not been; (d) claiming to have performed pregnancy tests on women he knew to have been sterilized; (e) falsely claiming to have diagnosed illness in connection with routine office visits not compensable by CHAMPUS or Medicaid without such a diagnosis; (f) claiming higher fees from insured patients than from cash-paying patients; (g) falsely claiming to have rendered higher-compensation "comprehensive" service when he had actually rendered "brief" or "intermediate" service; and (h) claiming pay-

ment for post-operative office visits by surgery patients even though such visits were to be subsumed in the claim for the surgery itself.

Alexander was charged with thirty-one counts of perpetrating this fraudulent scheme by use of the mails, Counts 1-31; eight counts of submitting a false claim to an agency of the United States, Counts 32-39; and one count of making a materially false statement in an application for Medicaid assistance benefits, Count 40. At the close of the Government's case-in-chief, the district court dismissed Count 27, a mail fraud count, on the Government's request. The jury then returned verdicts of guilty on the remaining thirty mail fraud counts, Counts 1-26 and 28-31, five false claim counts, Counts 32-34, 36 and 39, and the single false statement count, that is, Count 40. Alexander moved for a new trial, raising many of the objections now advanced on appeal. Accompanying the new trial motion was a motion for additional discovery, about which more will later be said. The court denied both motions and sentenced Alexander to concurrent thirty-month prison terms and cumulative $500.00 fines on counts 1 and 40, suspended imposition of sentence on the remaining counts, and ordered that the defendant be placed on probation for five years at the expiration of his period of incarceration. This appeal followed.

II

Alexander first argues that the evidence was insufficient to support the jury's verdict of guilty on mail fraud counts 1-4 and false statement counts 32-34 respectively. Because of the dispositive consequences of this contention were it to be upheld, we address it first and, in the end, reject it as to all these counts.

A

Counts 1-4 charged Alexander with use of the mails to defraud CHAMPUS by perpetrating, in violation of 18

U.S.C. § 1341,[1] the eight-part scheme previously outlined. The Government's prosecution of these counts proceeded on two alternative factual theories of guilt: (1) Alexander had fraudulently submitted to CHAMPUS insurance forms which claimed reimbursement for laboratory tests which were not in fact performed and (2) he had submitted claims which falsely indicated that the patient had no other medical insurance.[2]

The record amply supports finding of guilt based on the first, "non-performed tests," theory. Gloria V. Galanda, a CHAMPUS auditor who was one of the Government's principal witnesses, testified that although the CHAMPUS insurance forms submitted by Alexander claimed reimbursement for a number of tests performed for each of the parties involved,[3] his office records failed to indicate any results derived from these tests.[4] Furthermore, the Government's evidence suggested that Alexander's failure to perform tests for which benefits were claimed was a consistent and pervasive pattern in his practice.[5]

---

[1] 18 U.S.C. § 1341 prohibits the use of the mails for the purpose of executing a "scheme of artifice to defraud" or "for obtaining money or property by means of false or fraudulent . . . representations."

[2] Counts 1-4 involved claims for services rendered to two different patients on four separate occasions: Margaret Adamson, Counts 1, 2 and 4, and Helen Smith, Count 3.

[3] As was his apparent custom, Alexander claimed that he had performed three tests, urinalysis, wet and dry mount, and smear primary source gram stain on each occasion. A pregnancy test was allegedly performed for Ms. Smith.

[4] According to Galanda, CHAMPUS required documentation outside the patient interview records to support the claim that a test had been performed. While certain notations on Alexander's records arguably indicate that negative results had, in fact, been recorded, the Government's evidence sufficiently put actual performance in issue to support a contrary finding.

[5] Galanda testified that of the 732 insurance forms submitted, claiming reimbursement for 2938 routine laboratory tests, only one test result was recorded in his office records.

A number of Alexander's medical secretaries testified that although they routinely collected and labelled urine specimens, Alexander never tested the samples but directed that they be discarded at the day's end. They also indicated that Alexander rarely reordered supplies. They claimed never to have seen Alexander performing microscopic analysis although he was seen with a slide in his hand on a number of occasions. The only pregnanacy test materials seen in Alexander's office by a number of these secretaries were samples from pharmaceutical companies.

Alexander's business records indicated that he routinely tested all of his patients with the same battery of tests. Mrs. Galanda testified to random samples from Alexander's patient records which indicated that in the majority of cases Alexander routinely billed in *all* cases for urinalysis, wet and dry mount, and smear primary source stain. A substantial number of these billings also claimed reimbursement for pregnancy tests. According to a Blue Cross/Blue Shield "peer-group" analysis prepared and presented in evidence by witness Crumpler, Alexander ranked first among Tidewater-area gynecologists in performing urinalysis, pregnancy and "dry mount" smear tests and second highest for performing "wet mount" tests. Charles Halloran, a Medicaid investigator, compiled and presented in evidence similiar peer group data obtaining comparable results.[6]

The combined effect of this evidence, construed in the light most favorable to the Government, sufficed to allow a rational factfinder to find Alexander guilty beyond a reasonable doubt on the "non-performed tests" theory of guilt, *Glasser v. United States*, 315 U.S. 60 (1942), and we so hold.

---

[6] Alexander urges that the district court abused its discretion in admitting these studies into evidence, both because of their irrelevance to the counts charged and because of the inability of the witnesses offering them to answer pertinent questions on cross-examination. We find no abuse.

B

Whether the evidence also sufficed to support a conviction on the second, "no other insurance," theory is more problematic. For while the evidence undoubtedly supports a finding that in respect of each of the counts under challenge, Alexander submitted insurance forms, falsely disclaiming the existence of "other insurance," it does not as clearly support a finding of the requisite intent to defraud or to obtain "*money or property*" by means of false statements.

An example illustrates this difficulty. Count 1 alleged that Alexander had submitted to CHAMPUS, on behalf of Margaret Adamson, a claim for $64.00 for services performed on August 1, 1980. This total included claims for an office visit, $50.00, and three tests, billed at $5.00, $5.00 and $4.00 respectively. The claim form indicated that Adamson had no other insurance. In consequence, CHAMPUS paid $48.00 of the claim. Adamson was, in fact, also insured by Blue Cross/Blue Shield, which was "primary" to CHAMPUS in the sense that CHAMPUS required beneficiaries insured by both insurers to exhaust available Blue Cross resources before receiving payments from CHAMPUS. Blue Cross business records indicated, in fact, that Alexander had filed a claim for Adamson's August 1, 1980, visit, but had charged $25.00, $15.00 and $10.00 respectively for the same tests. Blue Cross had allowed $20.00, $10.00 and $6.00 for these tests, leaving unpaid balances of $5.00, $5.00 and $4.00, which were the exact amounts later billed to CHAMPUS.[7] Blue Cross was not billed for the $50.00 office visit fee, but such amounts were not insured under its policy. Whatever the misstatement concerning other insurance then, CHAMPUS was asked only for amounts for which it was primarily liable. Since billing in this manner could not have had

---

[7] This pattern is repeated in the evidence on Count 2 and arguably on Count 3.

the effect of "defrauding" CHAMPUS or of obtaining from it "money" by false representations but would have deprived it only of information, the evidence, it is argued, fails to establish the requisite intent.

We need not, and do not, decide whether that argument has merit. Assuming the evidence is insufficient to support conviction on the second alternative factual theory of guilt, the verdict is nonetheless supportable because of the sufficiency of the evidence on the first. Though under some circumstances a general verdict may so obscure the basis upon which a jury considering alternative theories found guilt that due process will not permit upholding a verdict possibly based upon the unsupported policy, *see, e.g., Stromberg v. California*, 283 U.S. 359 (1931); *United States v. Head*, 641 F.2d 174, 178-79 (4th Cir. 1981), the verdict here may be upheld on the saving principle that by careful record scrutiny it is possible to ascertain with a high degree of probability that the jury here did not rely upon the arguably unsupported theory. *See, Turner v. United States*, 396 U.S. 398 (1970); *United States v. Jacobs*, 475 F.2d 270 (2d Cir. 1973); *see also United States v. Tresvant*, 677 F.2d 1018, 1023-24 (4th Cir. 1982) (concurring opinion).

For several reasons, we are satisfied from the record that the jury here relied upon the supported rather than the arguably unsupported factual theory. Most critically, the jury's verdicts on the mail fraud counts, when assessed in relation to the evidence adduced at trial, do not vary depending upon whether the evidence showed that the patients involved did or did not have other insurance not disclosed on Alexander's claim forms. Thus, while the jury convicted on Counts 1-5, 8 and 11, in which the Government's evidence indicated that the patients involved had other insurance contrary to the disclosures on the respective claim forms, it also convicted on Counts 6, 7 and 9, in which the claim forms either made no statement concerning other insurance or correctly indicated that the patient had none.

Additionally, the jury's failure to convict on Counts 37 and 38, is telling. In each of these counts, there was some evidence to suggest that Alexander might have performed the tests, but the evidence of false concealment of other insurance varied. In both counts Alexander's records indicated that a pap smear was performed by an outside laboratory and results were recorded. In Count 37, the Government presented evidence indicating that the claim form falsely denied the existence of other insurance; no such evidence was introduced on Count 38.

We conclude that the record sufficiently indicates that the jury rested verdict on the first, evidentiarily supported theory so that even if the evidence in support of the second were insufficient to support conviction—a question we need not decide—this would not require reversal.

C

The contention that the evidence was insufficient to support conviction on false statement counts 32-34 is patently without merit. These counts charged false statements with respect to the existence of other insurance. The evidence indisputably showed that Alexander misstated that fact on each claim; his defense was only that this resulted from carelessness in "checking the wrong box." The jury heard the evidence and simply rejected this theory, concluding instead, as it rationally could, that the misstatement was intentionally a false one.

D

We therefore hold that the convictions on Counts 1-4 and 32-34 are supported by sufficient evidence under the *Glasser* standard.

III

We have considered other trial errors assigned by defendant as the basis for reversal or remand for new trial and conclude that none merits relief from the convictions.

First, Alexander contends that Count 1 of the indictment fails to charge a critical element of the crime, but we believe that the indictment sufficiently charged Alexander with a fraudulent use of the mails in violation of 18 U.S.C. § 1341. Second, we reject the contention that the indictment as a whole did not give adequate notice of the charges against Alexander; any need for further detail could have been supplied by a timely-requested bill of particulars. The instructions to the jury concerning the credibility of witnesses are, taken as a whole, neither erroneous nor, assuming error, prejudicial. Finally, in connection with defendant's claim of ineffectiveness of counsel, we simply observe that that claim is more properly considered in Alexander's pending motion in the district court for relief under 28 U.S.C. § 2255, and we express no opinion upon it.[8]

IV

Among the grounds for new trial unsuccessfully urged by Alexander in the district court was the Government's alleged failure to produce requested exculpatory material as required by *Brady v. Maryland*, 373 U.S. 83 (1963) and *United States v. Agurs*, 427 U.S. 97 (1976). The district court's denial of that motion is now assigned as error.

We conclude that the Government's equivocation in making critical factual representations to defense counsel and to the district court concerning its possession of certain of

---

[8] We observe only that the merits of Alexander's claim that his trial counsel was ineffective in failing to procure *Brady* materials is inextricably bound up with the merits of his claim of entitlement to a new trial because of a *Brady* violation by the Government in respect to the same materials, a claim that we remand for possible reconsideration by the district court. *See* Part IV *infra*. The district court may find it possible to consider the two in conjunction, and, in any event, must accommodate its consideration of the common issues raised in the two claims.

the requested materials fatally compromised the integrity of the proceedings on the new trial motion. In consequence the court's resulting order was tainted and cannot stand on the present record. Because the equivocation was only revealed on this appeal, we have concluded to remand to the district court for reconsideration of the motion in light of the circumstances now revealed and for such further proceedings as may then be indicated. Our reasons are as follows.

Our concern runs to only one of several sets of materials claimed by Alexander to have been withheld in violation of *Brady*. As to the others, we conclude that the district court did not err in finding no constitutional or statutory violation and that its order denying new trial is not otherwise tainted in respect of those materials. We therefore do not discuss them in detail.

The critical materials are a 1981 Blue Cross/Blue Shield subscriber survey of patients for whom Alexander claimed to have performed services, including most critically patient responses to questions concerning whether services for which Alexander had submitted insurance claims had actually been performed. We summarize the critical developments that have now been revealed respecting these materials, including important events in the process by which the revelation has occurred.

When Alexander made his pre-trial discovery request on May 31, 1983, he knew in general of the existence of the Blue Cross patient survey. Among the materials requested in his motion were all documents "which refer or relate to the claim forms of Blue Cross/Blue Shield . . . ."

At the time this request was received by the Government, the Government had in its possession critical elements of this survey, including the responses of 48 patients for whom Alexander had claimed to have performed services. This is revealed by an investigative agent's case

summary earlier prepared in anticipation of possible indictment and prosecution. This summary indicated that the survey results had been turned over to the Government investigators by Blue Cross and, most critically, that thirteen of the forty-eight patients contacted had reported that they did not receive all the services for which Alexander had submitted claims and, by implication, that the remaining thirty-five reported that they had received the services. The summary itself did not reveal the names of the patients in either category, making it impossible to match specific patients surveyed with any specifically identified in the indictment as patients in respect of whom Alexander had made allegedly fraudulent or false claims.

In response to Alexander's discovery request the Government did not produce any materials but instead allowed an open-file discovery by Alexander's trial counsel on June 13, 1983. Whether the patient survey results were in the Government files then made available for inspection is a critical factual question that, for reasons that will appear, is only now revealed to be a fairly disputable, and possibly dispositive, one respecting the claimed *Brady* violation.

The investigative case summary itself was later turned over to the defense on the eve of trial as *Jencks* material. As indicated, it would only have revealed that the survey had been made and that its specific results, as summarily reported, were known to the Government and were possibly in its possession in documentary form. The trial was therefore conducted with the Government in possession of the survey results, including the responses of individual patients to the inquiry about services, but with Alexander unaware of those responses, unless they were in the open files made available for inspection, a matter, as indicated, that is now shown to be disputable on the present record.

Following Alexander's conviction, his new counsel sought, incident to a new trial motion, to discover the

identity and the specific responses of the forty-eight patients included in the Blue Cross survey. Voluntary disclosure was first sought from the Government and, when that was refused, a motion for discovery was made. The discovery motion was denied and the new trial motion was therefore heard with defense counsel still unaware, as was the district court, of whether any of the patients surveyed were among those identified in specific counts of the indictment and also unaware of the specific responses of any of those surveyed.

It was at this point that the bothersome course of equivocation by the Government began. Before the hearing, the Assistant United States Attorney gave both defense counsel and his own supervisor to understand that the Government's position was that the survey results had not been, and presumably were not then, in the Government's possession. At the oral hearing on the motion, however, the same Government attorney, responding, he later said, to advice given him by Government investigative agents, changed his position and represented to the district court that the materials had indeed been in the Government's possession, but that they were in the Government files opened for defense counsel's pre-trial inspection. On the basis of that advice—which defense counsel plausibly now contends it was unprepared to dispute in view of the Government's pre-hearing representation—the district court rejected the *Brady* objection as grounds for a new trial.[9]

---

[9] The district court flatly rested rejection of the *Brady* claim upon the factual representation by Government trial counsel:

> The *Brady* material that [defense counsel] thinks may not have been furnished, I have the statement of the United States Attorney that this was literally an open file case and that the defendant himself and his attorney were given the records which [defense counsel] now complains of, and were allowed to go over them at their convenience.

Following this unanticipated change of Government position, and with this appeal pending, new defense counsel obtained from Alexander's trial counsel an affidavit stating that he did not recall seeing the survey responses or related audit items in the open file inspection he conducted. On the basis of that affidavit, defense counsel unsuccessfully sought from this court a "partial remand" to the district court to inquire into the facts of the open file inspection, both as incident to reconsideration of its new trial motion and in connection with a 28 U.S.C. § 2255 claim of ineffective assistance of trial counsel. *See* Part III *supra.*

When the appeal came on for oral argument in this court, the Government's equivocation on the matter continued. In response to a direct question from this court, the same Government trial counsel flatly represented that the survey materials were, at the critical times, in the possession of Blue Cross and that he had not seen them. This of course reverted to the position represented to defense counsel before the new trial hearing in district court, a position subsequently reversed at that hearing.

This position was once again reversed by Government counsel in response to a court-requested post-argument defense memorandum that appended the investigative case summary showing Government possession of the survey materials by acquisition from Blue Cross. The Government's letter response to this memorandum simply indicated that once again Government counsel had inadvertently misstated the position and that once again Government investigative agents had corrected Government counsel's recollection and recalled for him that the materials were in fact in the Government's possession. This time, however, the Government's position as to whether the materials' were in fact in the open files was itself stated with a new degree of equivocation. Rather than a flat statement that they *were* in the open files at

the time of the inspection,[10] the Government now only asserted that open file discovery was permitted and that, in addition, the Government had "instructed its investigative agents to bring whatever additional materials they had gleaned from Blue Cross."

From this regrettable course of proceedings, we can only conclude that whether the survey materials were actually produced by the open file inspection is a disputable question of fact that, because of the Government's conduct, was not fairly presented as such to the district court. If resolution of that factual question is required to resolve the *Brady* claim, defendant is now entitled to have it determined by the district court in a hearing appropriate to the factual inquiry.

The question remains, however, whether its resolution is required for that purpose. The Government contends that the defendant has not, in any event, made the requisite showing that the materials were required to be produced under the *Brady-Agurs* test. The short answer, as defendant points out, is that neither the defendant, nor this court, nor the district court could properly address that question without inspecting the survey responses and related Blue Cross audit materials that the Government now presumably concedes it has had in its possession all along.

It may well be that upon inspection the lack of *Brady-Agurs* relevance asserted by the Government will readily appear. But the defendant plausibly shows how exculpatory relevance *might* appear, depending upon the contents of the materials and upon whether the original discovery request specifically or only generally identified these materials.[11] *See Agurs*, 427 U.S. at 112. First, the patient

---

[10] The fact flatly represented to the district court at the hearing there on the motion for new trial. *See* note 9 *supra*.

[11] The Government's contentions in a post-argument reply memorandum that the charges against Alexander related so marginally to conduct involving Blue Cross that the materials could not on that

responses—thirty-five of which presumably indicated that services were performed—could tend to rebut the Government's proof of a pervasive practice of not performing tests as a circumstantial means of proving guilt of the specific offenses charged. Second, they could provide credible evidence that Alexander's failure to indicate test results on his office records was not probative that he had not in fact performed them, another facet of the Government's theory of prosecution. Finally, there could be among the thirty-five patients who presumably reported services performed some specifically identified in the indictment as not having received the services claimed.[12]

We of course do not now hold that if any of these possibilities are revealed, they dictate a finding of a *Brady* violation. That is a judgment for the district court to make based upon the record as a whole. We simply cite them as indicating the defendant's entitlement to dis-

---

account be material under *Brady* is disingenuous at best. A critical feature of the theory of prosecution—a feature in fact incorporated in each of the thirty-one mail fraud counts—was that the specific offenses charged in these counts were part of an overall scheme that included the submission of over $20,000 in false claims to Blue Cross. The Government's supporting statement that only two Blue Cross patients and four Blue Cross counts were involved is, for that reason, misleading at best. The extent of this material's *Brady* materiality can only be assessed by looking to its content.

[12] This possibility is indeed given some color on the present record. Following Alexander's conviction, the patient identified in Count 34 as one falsely stated by Alexander not to have other insurance revealed to Alexander's counsel that Alexander had indeed performed the services for which he made claim and that this fact had been reported on this patient's survey response. On trial the Government's witness, Galanda, had testified that not only had Alexander misstated the fact of other insurance coverage in respect of this patient but in fact had never performed the services reported. While this was not a "non-performance" count, so that the charge itself is not directly refuted by this patient's assertion, the possibility that among the other responses direct refutation might be found is underscored. The Government's witness indisputably testified to a fact refuted by this patient's response.

closure of the survey materials in order properly to press his *Brady* claim as a basis for new trial if, having inspected them, he concludes so to proceed.

We therefore vacate the district court's order denying new trial, and remand for its reconsideration in accordance with this opinion. Preliminarily, the Government should be ordered by the district court to produce for defendant's inspection all materials in the Government's possession at the time of defendant's pre-trial motion for discovery that related in any way to the Blue Cross patient survey.

If following inspection, the defendant desires to press his motion for new trial on the basis of a *Brady* violation in respect of those materials alone, he is entitled, upon proper notice to the court and the Government, to have the motion reconsidered on that basis. In that event, the district court should conduct an evidentiary hearing to determine: (a) whether the materials in issue were made available for defendant's inspection in the open file pretrial inspection permitted by the Government; (b) if not, whether the materials were the subject of specific or general request under *Agurs*; and (c) on that basis, whether the failure to produce the materials constituted a *Brady* violation requiring new trial.

Obviously, if the defendant does not timely request reconsideration of his new trial motion, or if the court finds either that the materials in issue were in fact produced by the Government or that failure to produce them did not constitute a *Brady* violation, the motion should be denied as reconsidered.

Except as remanded for the limited purpose of reconsidering defendant's new trial motion, the judgment of conviction is affirmed.

SO ORDERED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

October 22, 1984

TO: Judith A. Miller
Tommy E. Miller
Brendan V. Sullivan, Jr.
Janis H. Kockritz
Harold Ungar

NOTICE OF JUDGMENT

Judgment was entered in Case No. 83-5283 this date.

The Court's opinion is enclosed.

Petition for Rehearing (FRAP 40)

Filing Time

A petition may be filed within 14 days after judgment. *No extension will be granted save for the most compelling reasons.* Requests based on grounds such as miscalculation of time or a need to consult with others will be peremptorily denied.

Purpose

A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.
2. A change in the law which occurred after the case was submitted and which was overlooked by the panel.
3. An apparent conflict with another decision of the Court which is not addressed in the opinion.

The filing of a petition in order merely to reargue the case is an abuse of the privilege.

Statement of Counsel

A petition shall contain an introduction stating that, in counsel's judgment, one or more of the situations exist as described in the above "Purpose Section". The points to be raised shall be succinctly listed in the statement. Lacking such a statement, the petition will be returned to counsel without filing.

Form

The 15 page limit allowed by the Rule shall be observed. The Court requires 15 copies of the petition; however, a pro se party who is indigent may file the original only.

Bill of Costs (FRAP 39)

Filing Time

A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs within 14 days after judgment.

Mandate (FRAP 41)

Issuance Time

The mandate is issued 21 days after judgment. A timely petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7 days later. If a stay of mandate is sought, only the original of a motion need be filed.

Stay

A motion for stay of the issuance of the mandate shall not be granted simply upon request. Ordinarily the motion will be denied unless it would not be frivolous or filed merely for delay and would present a substantial question or otherwise set forth good or probable cause for a stay.

JOHN M. GREACEN
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 83-5283

UNITED STATES OF AMERICA,
Appellee,

versus

PETER V. ALEXANDER,
Appellant.

[Filed Dec. 11, 1984]

ORDER

This matter is before the court on appellant's petition for rehearing.

1. The petition for rehearing is DENIED;

2. The opinion previously filed in this case on October 22, 1984, is hereby withdrawn and amended by substituting for Part II C in that opinion the following:

C

The contention that the evidence was insufficient to support conviction on false claim counts 32-34 is without merit. These counts charged false claims by misrepresentation of the existence of other insurance in violation of 18 U.S.C. § 287. The evidence indisputably showed

that Alexander misstated the actual fact on each claim; his defense was only that this misrepresentation resulted from carelessness. The jury heard the evidence and simply rejected this theory, concluding instead, as it rationally could, that the misrepresentation was intentionally a false one.

Alexander's further contention that the evidence did not show that the false claims induced payment is misplaced. It need only be proven that they had a "tendency to induce the government to act." *United States v. Pruitt*, 702 F.2d 152, 155 (8th Cir. 1983). Where, as here, entitlement to payment turned on the non-existence of other insurance, a misrepresentation that this was the fact clearly had the requisite tendency.

Entered by direction of Judge Phillips for a panel consisting of Chief Judge Winter, Judge Phillips, and Senior Circuit Judge Butzner.

/s/ John M. Greacen
JOHN M. GREACEN
Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CR. 83-86-N

UNITED STATES OF AMERICA

vs.

PETER V. ALEXANDER,
Defendant

[Filed November 10, 1983]

In the presence of the attorney for the government the defendant appeared in person on this date—November 10, 1983.

COUNSEL

☐ WITHOUT COUNSEL However the court advised defendant of his right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant hereupon waived assistance of counsel.

☒ WITH COUNSEL Judith Miller and Richard G. Brydges

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,

☐ NOLO CONTENDERE, ☒ NOT GUILTY

FINDING & JUDGMENT

There being a verdict of

☒ NOT GUILTY, Defendant is discharged as to Counts 35, 37 and 38.

☒ GUILTY, as to Counts 1 through 26, inclusive; 28 through 34, inclusive, and 36, 39 and 40.

Defendant has been convicted as charged of the offense(s) of violation of Title 18 USC 1341; Title 18 USC 2 (Mail Fraud); Title 18 USC 287 (False Claims); and Title 42 USC 1396h; Title 18 USC 2 (Medicaid Fraud)

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that:

AS TO COUNTS 1 and 40: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for confinement for a period of TWO and ONE-HALF (2½) YEARS as to EACH COUNT and directed to pay a FINE of FIVE HUNDRED ($500.00) DOLLARS as to EACH COUNT. Confinement as to Count 40 is to run concurrently with sentence imposed as to Count 1.

SPECIAL CONDITIONS OF PROBATION

AS TO ALL REMAINING COUNTS: Imposition of sentence is suspended and defendant is placed on probation for FIVE (5) YEARS, usual conditions, commencing upon release from confinement.

(NOTE: Count 27 heretofore Dismissed)

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the conditions of probation at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

BOND PENDING APPEAL POSTED.

(Total Sentence: 2½ years confinement;
$1,000.00 Fine)

/s/ John A. MacKenzie
JOHN A. MACKENZIE
District Judge

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-559

PETER V. ALEXANDER,
Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 11, 1985.

/s/ Warren E. Burger
Chief Justice of the
United States

Dated this 23rd day of January, 1985.

APPENDIX F

18 U.S.C. § 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

* * * *

18 U.S.C. § 287. False, fictitious or fraudulent claims

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * *

18 U.S.C. § 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered

by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

* * * *

42 U.S.C. § 1396h. Offenses and penalties

(a) Making or causing to be made false statements or representations

Whoever—

(1) knowingly and willfully makes or causes to be made any false statement or representation of a material fact in any application for any benefit or payment under a State plan approved under this subchapter.

(2) at any time knowingly and willfully makes or causes to be made any false statement or representation of a material fact for use in determining rights to such benefit or payment.

(3) having knowledge of the occurrence of any event affecting (A) his initial or continued right to any such benefit or payment, or (B) the initial or continued right to any such benefit or payment of any other individual in whose behalf he has applied for or is receiving such benefit or payment, conceals or fails to disclose such event with an intent fraudulently to secure such benefit or payment either in a greater amount or quantity than is due or when no such benefit or payment is authorized, or

(4) having made application to receive any such benefit or payment for the use and benefit of another and having received it, knowingly and willfully converts such benefit or payment or any part thereof to a use other than for the use and benefit of such other person.

shall (i) in the case of such a statement, representation, concealment, failure, or conversion by any person in connection with the furnishing (by that person) of items or services for which payment is or may be made under this subchapter, be guilty of a felony and upon conviction thereof fined not more than $25,000 or imprisoned for not more than five years or both, or (ii) in the case of such a statement, representation, concealment, failure, or conversion by any other person, be guilty of a misdemeanor and upon conviction thereof fined not more than $10,000 or imprisoned for not more than one year, or both. In addition, in any case where an individual who is otherwise eligible for assistance under a State plan approved under this subchapter is convicted of an offense under the preceding provisions of this subsection, the State may at its option (notwithstanding any other provision of this subchapter or of such plan) limit, restrict, or suspend the eligibility of that individual for such period (not exceeding one year) as it deems appropriate; but the imposition of a limitation, restriction, or suspension with respect to the eligibility of any individual under this sentence shall not affect the eligibility of any other person for assistance under the plan, regardless of the relationship between that individual and such other person.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA NORFOLK DIVISION

Criminal No. 83-86-N

UNITED STATES OF AMERICA

v.

PETER V. ALEXANDER

THE GRAND JURY CHARGES THAT:

COUNT ONE

Preliminary Statements

1. At all times material to this indictment, the defendant, PETER V. ALEXANDER, was a medical doctor licensed to practice in the Commonwealth of Virginia.

2. From on or about May 15, 1978 to on or about March 1, 1979, PETER V. ALEXANDER maintained medical offices at 533 Newton Road, Virginia Beach, Virginia.

3. From on or about March 1, 1979 to December 7, 1982, PETER V. ALEXANDER maintained medical offices at Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia.

4. At all times material to this indictment "Medicaid," as provided in Title XIX of the Social Security Act of 1965 provided medical assistance for families with dependent children and aged, blind or disabled individuals

whose resources were insufficient to meet the cost of necessary medical services.

5. At all times material to this indictment, the United States Department of Health and Human Services (hereinafter "HHS" formerly Department of Health, Education and Welfare) and the Commonwealth of Virginia Department of Health administered and supervised the administration of the Medicaid program in Virginia.

6. At all times material to this indictment, the United States Government contributed at least 50% of the cost of the Medicaid program with the remaining cost provided by the Commonwealth of Virginia.

7. At all times material to this indictment, the Virginia Department of Health established procedures in accordance with regulations of HHS to compensate physicians for services provided to medical assistance recipients.

8. At all times material to this indictment, providers of medical service were required to submit Practitioner Invoice Form MAP-12 to The Computer Company, 1905 Westmoreland Street, Richmond, Virginia, the fiscal intermediary of the Virginia Medical Assistance Program.

9. At all times material to this indictment, The Computer Company acting as a fiscal intermediary under contract with the Department of Health received, processed and authorized payment to providers of services under the Medicaid program.

10. At all times material to this indictment, payment to providers of medical services under the Medicaid program were routinely sent to the providers through the United States mail.

11. At all times material to this indictment, PETER V. ALEXANDER submitted claims to Medicaid through The Computer Company for medical services pursuant to a physician participation agreement utilizing provider number 62-4945-1.

12. At all times material to the indictment The Computer Company mailed payments through the United States mails for claims submitted by PETER V. ALEXANDER to his medical office address.

13. At all times material to this indictment, the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), was a federally funded medical benefits program provided by the federal government to help pay for civilian medical care rendered to spouses and children of active duty uniformed services personnel; to retired uniformed services personnel, their spouses and children; to spouses and children of deceased active duty; and deceased retired uniformed services personnel. CHAMPUS was established by Title 10, United States Code, Chapter 55 and operated in accordance with the policies and procedures set forth in Department of Defense CHAMPUS Regulation 6010.8-R.

14. At all times material to this indictment, CHAMPUS was managed and operated by the Office of Civilian Health and Medical Program of the Uniformed Services (OCHAMPUS), Aurora, Colorado. OCHAMPUS contracted with private insurance organizations to help administer the CHAMPUS program particularly in processing and paying claims. These organizations are known as CHAMPUS contractors or fiscal intermediaries.

15. Between August 1, 1977 and September 30, 1981, the CHAMPUS intermediary for the Virginia Beach, Virgina area was Blue Cross/Blue Shield of Southwest Virginia, Roanoke, Virginia.

16. From October 1, 1981 through December 7, 1982, the CHAMPUS fiscal intermediary for claims submitted from the Virginia Beach, Virginia area was Blue Cross/Blue Shield of South Carolina, Columbia, South Carolina.

17. At all times material to this indictment, PETER V. ALEXANDER submitted CHAMPUS Claim Form 500 to the fiscal intermediaries for OCHAMPUS as a pro-

vider of medical services under doctor number VA V16930265.

18. At all times material to this indictment under CHAMPUS Regulation 6010.8-R, Chapter VII, a participating doctor provider's signature on a CHAMPUS claim form must certify that the specific medical care listed on the claim form was in fact rendered to the specific beneficiary/patient for which the benefits are being claimed on a specific date indicated.

19. At all times material to this indictment where the CHAMPUS beneficiary is eligible for medical benefits covered through another plan's insurance, CHAMPUS Regulation 6010.8-R, Chapter VII requires that the following information be provided on the CHAMPUS claim forms submitted by the provider to the CHAMPUS fiscal intermediary for payment.

a. Name of other coverage;

b. Source of double coverage;

c. Employer information; and

d. Identification number.

This information was required for coordination of benefits of the payment of CHAMPUS benefits with the payment of benefits made by the double coverage plan so that there would be no duplication of benefits paid between the double coverage plan and CHAMPUS.

20. At all times material to this indictment the CHAMPUS fiscal intermediary mailed payments through the United States mail for claims submitted by PETER V. ALEXANDER to his medical office address.

21. At all times material to this indictment, Blue Cross/Blue Shield of Virginia, Richmond, Virginia, was a plan for furnishing prepaid hospital, medical or surgical services and similar or related services established

under the authority of the Code of Virginia Sections 38.1-810, 811.

22. At all times material to this indictment, PETER V. ALEXANDER submitted claims to Blue Cross/Blue Shield of Virginia for medical services using provider number 01602 on Health Insurance Claim Form 95.

23. At all times material to this indictment Blue Cross/Blue Shield of Virginia mailed payments through the United States mail for claims submitted by PETER V. ALEXANDER to his medical office address.

SCHEME

24. From on or about May 15, 1978 to on or about December 7, 1982, the defendant, PETER V. ALEXANDER, devised and intended to devise a scheme and artifice to defraud and to obtain money from HHS, the Virginia Department of Health, CHAMPUS and Blue Cross/Blue Shield of Virginia, by means of false and fraudulent pretenses and representations.

25. It was part of the scheme and artifice that from on or about May 15, 1978 to on or about December 7, 1982, the defendant, PETER V. ALEXANDER would and did prepare and cause to be prepared claims to CHAMPUS, Blue Cross/Blue Shield of Virginia and Medicaid in which PETER V. ALEXANDER submitted duplicate claims for the same services to more than one health care plan without disclosing the duplicate coverage to each plan.

26. It was further a part of the scheme and artifice that PETER V. ALEXANDER fraudulently used the Procedure Codes contained in Physicians' Current Procedural Terminology, Third and Fourth Editions in order to falsely submit claims to CHAMPUS, Blue Cross/Blue Shield of Virginia and Medicaid.

27. It was further a part of the scheme and artifice that the defendant, PETER V. ALEXANDER, would

and did prepare and cause to be prepared claims to CHAMPUS, Blue Cross/Blue Shield and Medicaid which he claimed to have performed services, i.e.:

a. Pregnancy test (Chorionic Gonadotropin, bioassay; qualitative).

b. Basic Miscroscopic Examination (Smear, primary source, with interpretation; routine stain for bacteria, fungi or cell types);

c. Wet and dry mount microscopic examination (Wet and dry mount; with interpretation for ova and parasites);

d. Urinalysis (routine without miscroscopey).

When in truth and in fact these tests were not performed.

27. It was further a part of said scheme and artifice to defraud that the defendant, PETER V. ALEXANDER, submitted claims for payments for pregnancy tests that he claimed to have performed on women whom he knew had been sterilized.

28. It was a further part of the said scheme and artifice that the defendant, PETER V. ALEXANDER, would state on the claim forms that he had diagnosed an illness for patients who were making routine non-illness related office visits knowing that CHAMPUS and Medicaid would not pay for visits to a physician unless there was a diagnosis of injury or illness stated on the claim for payment.

29. It was further a part of the scheme and artifice that PETER V. ALEXANDER submitted claims to CHAMPUS, Blue Cross/Blue Shield of Virginia and Medicaid which charged higher fees than he charged to cash paying patients who had received the same level or type of services.

30. It was further a part of the said scheme and artifice that the defendant PETER V. ALEXANDER submitted claims to CHAMPUS and Medicaid in which

he stated that he had given comprehensive service to a patient for payment at a higher rate when in fact he had only given brief service and intermediate service which paid the provider of medical services a lower rate of payment.

31. It was further a part of the said scheme and artifice that the defendant, PETER V. ALEXANDER, submitted claims to CHAMPUS and Medicaid for post operative office visits by surgery patients even though such post operative visits are included in the claim for the surgery allowance.

32. It was further a part of the said scheme and artifice that the defendant PETER V. ALEXANDER received at least $47,927.74 from CHAMPUS for over payment for the false claims submitted to CHAMPUS.

33. It was further a part of the said scheme and artifice that the defendant PETER V. ALEXANDER received at least $21,538.02 from Blue Cross/Blue Shield of Virginia for over payment for the false claims submitted to Blue Cross/Blue Shield of Virginia.

34. It was further a part of the said scheme and artifice that the defendant PETER V. ALEXANDER received at least $20,874.25 from Medicaid for over payment for the false claims submitted to Medicaid.

35. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about January 9, 1981, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Peter V. Alexander, M.D., Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia containing, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT TWO

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about January 30, 1981, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check no. 9134733 from Blue Cross/Blue Shield of Southwest Virginia, Roanoke, Virginia, the fiscal intermediary for CHAMPUS, in the amount of $1,451.46, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT THREE

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about February 24, 1981, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 9140754 from Blue Cross/Blue Shield of Southwest Virginia, Roanoke,

Virginia, the fiscal intermediary for CHAMPUS, in the amount of $818.15, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT FOUR

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about June 2, 1981, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 9162983 from Blue Cross/Blue Shield of Southwest Virginia, Roanoke, Virginia, the fiscal intermediary for CHAMPUS, in the amount of $1,255.55, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT FIVE

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about January 7, 1982, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed

and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 00101877 of Blue Cross/Blue Shield of South Carolina, Columbia, South Carolina, the fiscal intermediary for CHAMPUS in the amount of $2,816.65, which envelope had been sent and delivered by the United State Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT SIX

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about May 28, 1982, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 00294858 of Blue Cross/Blue Shield of South Carolina, Columbia, South Carolina, the fiscal intermediary for CHAMPUS in the amount of $521.17, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT SEVEN

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about June 12, 1982, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 00306215 of Blue Cross/Blue Shield of South Carolina, Columbia, South Carolina, the fiscal intermediary for CHAMPUS in the amount of $116.65, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT EIGHT

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about August 13, 1982, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 00378075 of Blue Cross/Blue Shield of South Carolina, Columbia, South Carolina, the fiscal intermediary for CHAMPUS in the amount of $100.66, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT NINE

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about September 19, 1982, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 00415030 of Blue Cross/Blue Shield of South Carolina, Columbia, South Carolina, the fiscal intermediary for CHAMPUS in the amount of $466.36, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT TEN

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about September 30, 1982, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 00448239 of Blue Cross/Blue Shield of South Carolina, Columbia,

South Carolina, the fiscal intermediary for CHAMPUS in the amount of $1,161.49, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT ELEVEN

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about November 19, 1982, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 0000057607 of Blue Cross/Blue Shield of South Carolina, Columbia, South Carolina, the fiscal intermediary for CHAMPUS in the amount of $1,047.72, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT TWELVE

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about September 29, 1978, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, re-

moved and caused to be removed from an authorized depository for mail matter an envelope addressed to 533 Newtown Road, Virginia Beach, Virginia, containing check number 0572239 of The Computer Co., the fiscal intermediary for the Virginia Medical Assistance Program, Richmond, Virginia, in the amount of $1,040.00, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT THIRTEEN

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about October 27, 1978, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to 533 Newtown Road, Virginia Beach, Virginia, containing check number 0593939 of The Computer Co., the fiscal intermediary for the Virginia Medical Assistance Program, Richmond, Virginia, in the amount of $1,345.50, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT FOURTEEN

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about January 12, 1979, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to 533 Newtown Road, Virginia Beach, Virginia, containing check number 0661370 of The Computer Co., the fiscal intermediary for the Virginia Medical Assistance Program, Richmond, Virginia, in the amount of $3,082.00, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT FIFTEEN

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about February 23, 1979, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to 533 Newtown Road, Virginia Beach, Virginia, containing check number 0695534 of The Computer Co., the fiscal intermediary for the Virginia Medical Assistance Program, Richmond, Virginia, in the amount of $1,428.00, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT SIXTEEN

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about April 13, 1979, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 0734869 of The Computer Co., the fiscal intermediary for the Virginia Medical Assistance Program, Richmond, Virginia, in the amount of $1,983.00, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT SEVENTEEN

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about July 20, 1979, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 0113359 of The Computer Co., the fiscal intermediary for the Virginia Medical Assistance Program, Richmond, Virginia, in the

amount of $1,097.00, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT EIGHTEEN

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about September 28, 1979, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 0169978 of The Computer Co., the fiscal intermediary for the Virginia Medical Assistance Program, Richmond, Virginia, in the amount of $697.00, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT NINETEEN

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about January 18, 1980, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized

depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 0263572 of The Computer Co., the fiscal intermediary for the Virginia Medical Assistance Program, Richmond, Virginia, in the amount of $2,158.00, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT TWENTY

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about February 22, 1980, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 0293785 of The Computer Co., the fiscal intermediary for the Virginia Medical Assistance Program, Richmond, Virginia, in the amount of $2,037.00, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT TWENTY-ONE

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about May 16, 1980, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 0378374 of The Computer Co., the fiscal intermediary for the Virginia Medical Assistance Program, Richmond, Virginia, in the amount of $872.00, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT TWENTY-TWO

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about August 22, 1980, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 0141100 of The Computer Co., the fiscal intermediary for the Virginia Medical Assistance Program, Richmond, Virginia, in the amount of $1,185.00, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT TWENTY-THREE

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about January 16, 1981, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 0287140 of The Computer Co., the fiscal intermediary for the Virginia Medical Assistance Program, Richmond, Virginia, in the amount of $3,058.00, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT TWENTY-FOUR

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about March 27, 1981, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 0360082 of The Computer Co., the fiscal intermediary for the Virginia Medical As-

sistance Program, Richmond, Virginia, in the amount of $1,234.00, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT TWENTY-FIVE

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about July 3, 1981, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 0507247 of The Computer Co., the fiscal intermediary for the Virginia Medical Assistance Program, Richmond, Virginia, in the amount of $804.00, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT TWENTY-SIX

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about January 29, 1982, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed

and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 0729379 of The Computer Co., the fiscal intermediary for the Virginia Medical Assistance Program, Richmond, Virginia, in the amount of $699.30, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT TWENTY-SEVEN

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about June 10, 1980, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 070330 of Blue Cross/Blue Shield of Virginia, Richmond, Virginia, in the amount of $1,756.65, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT TWENTY-EIGHT

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about July 7, 1981, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 531088 of Blue Cross/Blue Shield of Virginia, Richmond, Virginia, in the amount of $469.00, which envelope had been sent and delivered by United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT TWENTY-NINE

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about July 15, 1980, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 105770 of Blue Cross/Blue Shield of Virginia, Richmond, Virginia, in the amount of $896.35, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT THIRTY

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment

and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about January 13, 1981, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 311956 of Blue Cross/Blue Shield of Virginia, Richmond, Virginia, in the amount of $4,524.25, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT THIRTY-ONE

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about May 26, 1981, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 482667 of Blue Cross/Blue Shield of Virginia, Richmond, Virginia, in the amount of $958.65, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT THIRTY-TWO

THE GRAND JURY FURTHER CHARGES THAT:

On or about August 22, 1980, in the Eastern District of Virginia, the defendant, PETER V. ALEXANDER, did present to the Civilian Health and Medical Program of the United States (CHAMPUS), an agency of the Department of Defense of the United States, for payment of a claim against the United States for medical services allegedly supplied to Josephine Cortese when PETER V. ALEXANDER then knew that claim was fraudulent in that defendant's claim form falsely stated that Josephine Cortese did not have any other active insurance, when in fact defendant had submitted a claim to Blue Cross/Blue Shield of Virginia, under a Blue Cross/Blue Shield of Virginia policy under which Josephine Cortese held coverage. Defendant's submission of a falsified claim caused CHAMPUS to pay for laboratory tests which were paid, and should have been paid, by Blue Cross/Blue Shield of Virginia.

(In violation of Title 18, United States Code, Section 287.)

COUNT THIRTY-THREE

THE GRAND JURY FURTHER CHARGES THAT:

On or about August 26, 1980, in the Eastern District of Virginia, the defendant, PETER V. ALEXANDER, did present to the Civilian Health and Medical Program of the United States (CHAMPUS), an agency of the Department of Defense of the United States, for payment of a claim against the United States for medical services allegedly supplied to Margaret Adamson when PETER V. ALEXANDER then knew that claim was fraudulent in that his claim form falsely stated that Margaret Adamson did not have any other active insurance, when in fact defendant had submitted a claim to Blue Cross/Blue Shield of Virginia, claiming payment for the same medical services under a Blue Cross/Blue Shield of Virginia

policy held by Margaret Adamson. Defendant's submission of a falsified CHAMPUS claim caused CHAMPUS to pay $600.00 as its maximum allowable payment, instead of $400.00 it should have paid by taking in to account payments by Blue Cross/Blue Shield of Virginia.

(In violation of Title 18, United States Code, Section 287.)

COUNT THIRTY-FOUR

THE GRAND JURY FURTHER CHARGES THAT:

On or about January 16, 1981, in the Eastern District of Virginia, the defendant, PETER V. ALEXANDER, did present to the Civilian Health and Medical Program of the United States (CHAMPUS), an agency of the Department of Defense of the United States, for payment of a claim against the United States for medical services allegedly supplied to Louise Ison when PETER V. ALEXANDER then knew that claim was fraudulent in that defendant's claim form falsely stated that Louise Ison did not have any other active insurance, when in fact defendant had submitted a claim to Blue Cross/Blue Shield of Virginia, under a Blue Cross/Blue Shield of Virginia policy under which Louise Ison held coverage. Defendant's submission of a falsified claim caused CHAMPUS to pay for laboratory tests which were paid, and should have been paid, by Blue Cross/Blue Shield of Virginia.

(In violation of Title 18, United States Code, Section 287.)

COUNT THIRTY-FIVE

THE GRAND JURY FURTHER CHARGES THAT:

On or about April 14, 1981, in the Eastern District of Virginia, the defendant, PETER V. ALEXANDER, did present to the Civilian Health and Medical Program of the United States (CHAMPUS), an agency of the Department of Defense of the United States, for payment of a claim against the United States for medical services

allegedly supplied to Frances Cox when PETER V. ALEXANDER then knew that claim was fraudulent in that he claimed to have performed a pregnancy test for her on March 16, 1981, knowing that he had performed a permanent sterilization by removal of her Fallopian tubes (bilateral salpingectomy) on January 16, 1981.

(In violation of Title 18, United States Code, Section 287.)

COUNT THIRTY-SIX

THE GRAND JURY FURTHER CHARGES THAT:

On or about June 2, 1981, in the Eastern District of Virginia, the defendant, PETER V. ALEXANDER, did present to the Civilian Health and Medical Program of the United States (CHAMPUS), an agency of the Department of Defense of the United States, for payment of a claim against the United States for medical services allegedly supplied to Lois Donaldson when PETER V. ALEXANDER then knew that claim was fraudulent in that:

1. Defendant had already received payment for the office visit claimed on this claim, as a post-operative visit after surgery performed on May 1, 1981, for which he had already received payment from CHAMPUS; and

2. Defendant claimed to have performed a pregnancy test for Lois Donaldson on May 8, 1981, knowing that he had performed a dilation and curettage of her uterus and permanent sterilization by ligation of her Fallopian tubes on May 1, 1981.

(In violation of Title 18, United States Code, Section 287.)

COUNT THIRTY-SEVEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about June 30, 1981, in the Eastern District of Virginia, the defendant, PETER V. ALEXANDER, did present to the Civilian Health and Medical Program of the United States (CHAMPUS), an agency of the De-

partment of Defense of the United States, for payment of a claim against the United States for medical services allegedly supplied to Patricia Repko when PETER V. ALEXANDER then knew that claim was fraudulent in that defendant's claim form falsely stated that Patricia Repko did not have any other active insurance, when in fact defendant had submitted a claim to Blue Cross/Blue Shield of Virginia, under a Blue Cross/Blue Shield of Virginia policy under which Patricia Repko held coverage. Defendant's submission of a falsified claim caused CHAMPUS to pay for laboratory tests which were paid, and should have been paid, by Blue Cross/Blue Shield of Virginia.

(In violation of Title 18, United States Code, Section 287.)

COUNT THIRTY-EIGHT

THE GRAND JURY FURTHER CHARGES THAT:

On or about January 7, 1982, in the Eastern District of Virginia, the defendant, PETER V. ALEXANDER, did present to the Civilian Health and Medical Program of the United States (CHAMPUS), an agency of the Department of Defense of the United States, for payment of a claim against the United States for medical services allegedly supplied to Evangeline Berka when PETER V. ALEXANDER then knew that claim was fraudulent in that he claimed to have performed the following tests, which he had not in fact performed:

1. Urinalysis, routine, without microscopy (procedure code 81002);

2. Pregnancy test (chronic gonadotropin, bioassay, qualitative, procedure code 82996);

3. Smear, primary source, with interpretation, routine strain for bacteria, fungi, or cell types (procedure code 87205); and

4. Wet and dry mount, with interpretation, for ova and parasites (procedure code 87211).

(In violation of Title 18, United States Code, Section 287.)

COUNT THIRTY-NINE

THE GRAND JURY FURTHER CHARGES THAT:

On or about May 14, 1982, in the Eastern District of Virginia, the defendant, PETER V. ALEXANDER, did present to the Civilian Health and Medical Program of the United States (CHAMPUS), an agency of the Department of Defense of the United States, for payment of a claim against the United States for medical services allegedly supplied to Evangeline Berka when PETER V. ALEXANDER then knew that claim was fraudulent in that:

1. Defendant had already received payment for the office visit claimed on this claim, as a post-operative visit after surgery performed on December 18, 1981, for which he had already received payment from CHAMPUS; and

2. Defendant claimed to have performed the following tests, which he had not in fact performed:

a. Urinalysis, routine, without microscopy (procedure code 81002);

b. Wet and dry mount, with interpretation, for ova and parasites (procedure code 87211);

c. Smear, primary source, with interpretation, routine stain for bacteria, fungi, or cell types (procedure code 87205); and

d. Pregnancy test (chorionic gonadotropin, bioassay, qualitative, procedure code 82996).

(In violation of Title 18, United States Code, Section 287.)

COUNT FORTY

THE GRAND JURY FURTHER CHARGES THAT:

On or about January 4, 1982, in the Eastern District of Virginia, PETER V. ALEXANDER did knowingly and willfully make and cause to be made a false statement of a material fact in an application for payment of services through the Virginia Medical Assistance Program, a State approved medical assistance plan under Title 42, Chapter 7 of the United States Code in that PETER V. ALEXANDER fraudulently stated that he had performed a urinalysis, a wet and dry mount microscopic examination, a basic microscopic examination and a pregnancy test during an examination of Patricia Jeffcoat on August 17, 1981, when he knew that no such tests had been performed.

(In violation of Title 42, United States Code, Section 1396h and Title 18, United States Code, Section 2.)

A TRUE BILL:

/s/ Herbert L. Briggs
Foreman

ELSIE L. MUNSELL
United States Attorney

By: /s/ Tommy E. Miller
TOMMY E. MILLER
Assistant United States Attorney

APPENDIX H

(CROSS EXAMINATION OF MR. HALLORAN BY TRIAL COUNSEL RE PEER GROUP)

Q. These other doctors that you examined, this peer group you are telling us about, Mr. Halloran, they were general surgeons, were they not?

A. And OB/GYN

Q. In general surgeons do a great deal of their testing in the hospital, don't they?

A. They don't do a great deal of testing.

Q. Well, why did you select them?

A. I didn't select them. This is a so-called management report that is generated every quarter for Medicaid and this was the peer group as set up by people other than myself. And I simply went and pulled those records.

Q. All right.

A. I can't explain why surgeons are in it any more than you can, sir.

Q. So you can't tell the jury how much of the testing that you are talking about, 90 some percent. They may have 90 percent done in the hospital there. You don't know that, do you, as opposed to a one man practitioner who does it all in his office?

A. I think that Dr. Alexander had patients in the hospital, too.

Q. But his operative reports?

A. One would offset the other.

Q. Did you read his operative reports?

A. Yes.

Q. And they showed that testing was done in the hospital?

A. Yes, sir.

Q. But you got general surgeons in here that probably do little or no testing in their office; isn't that a fair statement?

A. But still from a statistical standpoint they are doing, they would wash themselves out.

Q. How do you know that?

A. I have had about fifteen hours in statistics.

Q. I understand that. But the doctors would be the ones to express that opinion; wouldn't they. How much they did in the office and how much did testing, instead of you coming in here and saying he did 90 percent more than somebody else. You don't know what the circumstances or variables of that are, do you, of your own knowledge, except you compared them to a group of some people?

A. Compared them to all obstreticians and gynecologists in the state.

Q. For doing what kinds of diagnostic testing?

A. Any.

Q. Any kind?

A. Yes.

Q. Not hospital—

A. No, not x-rays. Strictly to pathological examinations, so called patient log.

Q. Did you isolate OB/GYNs from the general surgeons or lump them all together?

A. They are all together.

Q. Dr. Alexander is not a general surgeon, is he?

A. No.

Q. Why did you put him in there?

A. I didn't put him even in there.

Q. All right, Mr. Halloran.